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83-45

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS CARNICLE,
Petitioner,

v.

JOHN FOX, Sheriff of Morris County,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK J. KADISH
ROSALYN S. KADISH
KADISH AND KADISH, P.C.
955 West Wesley Road, N.W.
Atlanta, Georgia 30327
(404) 351-6200

QUESTION PRESENTED FOR REVIEW

WHETHER THE EXCLUSION OF PETITIONER FROM AN *IN CAMERA* CONFERENCE DURING THE COURSE OF HIS TRIAL DEPRIVED HIM OF HIS RIGHT TO BE PRESENT AT ALL PHASES OF HIS TRIAL, HIS RIGHT TO DEFEND THE CHARGES AGAINST HIM, AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE SIMILAR PROVISIONS OF THE CONSTITUTION OF THE STATE OF NEW JERSEY.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS CARNICLE,
Petitioner,

v.

JOHN FOX, Sheriff of Morris County,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Francis Carnicle, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 12, 1983. That decision affirmed the June 30, 1982 judgment of the United States District Court for the District of New Jersey.

OPINIONS BELOW

The direct appeal of petitioner's sentence of conviction for assault with intent to rape is reproduced as Appendix "A".

An Application for a Writ of Habeas Corpus was filed in the Superior Court of New Jersey, Law Division, Morris County. Petitioner's Writ of Habeas Corpus was denied by the Superior Court on February 23, 1981. (Appendix "B")

On March 24, 1982, the Supreme Court of New Jersey, Appellate Division, affirmed the denial of post-conviction relief. (Appendix "C")

On June 9, 1982, Petitioner filed a Motion for Habeas Corpus by a State Prisoner Pursuant to 28 U.S.C. §2254. The oral opinion of the United States District Court for the District of New Jersey, denying the writ of habeas corpus and the Order entered pursuant thereto is reproduced as Appendix "D".

The May 12, 1983 Judgment Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court is set forth as Appendix "E".

JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Third Circuit was entered on May 12, 1983. This petition for certiorari is being timely mailed for filing within sixty days of that date, pursuant to Rule 28.2 of this Court. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

New Jersey Court Rules

RULE 3:16. PRESENCE OF THE DEFENDANT

The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by rule, but the defendant's voluntary absence after trial has commenced in his presence shall not prevent its continuing to and including the return of the verdict.

STATEMENT OF THE CASE

On May 9, 1978, the Morris County Grand Jury returned a three count indictment against the Petitioner, charging him with (I) rape contrary to *N.J.S.A.* 2A:138-1; (II) assault with intent to rape contrary to *N.J.S.A.*

2A:90-2; and (III) atrocious assault and battery contrary to *N.J.S.A.* 2A:90-1.

Petitioner was tried before a jury in the Superior Court of New Jersey, Law Division, Morris County, the Honorable Charles M. Egan, Jr. presiding and on February 8, 1979, he was convicted of assault with intent to rape and of atrocious assault and battery. He was acquitted of rape.

Petitioner was subsequently sentenced to a term of three to five years in the New Jersey State Prison and a $3,000.00 fine on Count Two and two to three years incarceration on Count Three, to run concurrent with Count Two.

Appellant appealed and on October 31, 1980, his conviction for assault with intent to rape was affirmed, while his conviction for atrocious assault and battery was vacated.

On January 26, 1981, Appellant filed a Writ of Habeas Corpus in the Superior Court of New Jersey, Law Division, Morris County; the Petition was denied on February 23, 1981.

The Supreme Court of New Jersey, Appellate Division, affirmed the denial of post-conviction relief and vacated a stay of sentence. A Petition for Certification in the Supreme Court of New Jersey was denied.

On June 9, 1982, Petitioner filed a Motion for Habeas Corpus by a State Prisoner Pursuant to 28 U.S.C. § 2254. On June 30, 1982, the writ was denied by the Honorable H. Curtis Meanor, United States District Judge, United States District Court for the District of New Jersey, who certified that there was probable cause for appeal.

In a Judgment Order entered on May 12, 1983, the United States Court of Appeals for the Third Circuit

affirmed the District Court's denial of post-conviction relief.

After a jury trial, Petitioner was convicted on the uncorroborated testimony of the alleged victim, Debbie Langner. There were no witnesses to the alleged rape and although several family members were present in the home at the time, no one was aware of a struggle taking place. A chemist from the State Police Laboratory testified that no seminal stains were found on vaginal washings taken from the alleged victim, nor on her clothing or bed linens. The state lab chemist further testified that all hair specimens matched those of the victim and that there were no head hairs other than those of the victim. Additionally, all fingernail scrapings were negative.

Petitioner testified in his own behalf and stated that after returning from the evening out with his wife, he came home and went to sleep until his son, Michael, woke him in the morning. He denied seeing Ms. Langner at all on the day in question and he denied committing a rape.

During the course of the trial, several *in camera* hearings took place within Judge Egan's chambers. Petitioner was not asked to attend these hearings and was not present at any of them.

The first *in camera* hearing occurred on the first day of trial, February 1, 1979.[1] During this time, Debbie Langner was voir dired at length by the Court, the prosecutor and defense counsel concerning other instances of sexual conduct prior to the time of the alleged rape. During the

[1] Although six *in camera* conferences took place during the course of his trial, Petitioner objects only to the February 1, 1979 hearing as violative of his rights under the Fifth, Sixth and Fourteenth Amendments. The statement of facts briefly describes all six in chambers hearings in order to illustrate the pattern of proceeding in the defendant's absence as established by the trial judge.

course of questioning, Ms. Langner stated that she had an abortion two months prior to the alleged rape. In addition, Ms. Langner stated that immediately after the alleged rape, she smoked marijuana. Ms. Langner was questioned further concerning her use of drugs and marijuana in particular. Ms. Langner was then excused from the hearing and the Court and counsel continued discussion of the legal issues. Defense counsel argued that Ms. Langner's prior sexual conduct should be admissible as should her use of marijuana on the morning of the alleged rape. Petitioner was excluded from this in chambers hearing.

Again, on February 1, 1979, a hearing took place outside the presence of petitioner during which the prosecutor made several objections to defense counsel's opening statement.

The next in chambers hearing took place on February 5, 1979, during a recess in the direct examination of Ms. Langner. Counsel and the Court discussed the admissibility of allegations of prior misconduct on the part of Petitioner.

Again, on February 5, 1979, an in chambers hearing took place in the absence of Petitioner. Counsel and the Court discussed whether Ms. Langner's testimony that she was smoking marijuana on the morning of the alleged rape would be admissible at trial. In addition, the admissibility of certain diary entries was discussed.

On February 6, 1979, another in chambers hearing was held in the absence of Petitioner. At this hearing, the Court and counsel discussed the admissibility of certain testimony which would be offered by defense witness, Michael Carnicle.

On February 7, 1979, an *in camera* conference was held

wherein the Court entertained exceptions to the jury charge. Petitioner was not present during this conference.

The jury verdict was received on February 8, 1979. Petitioner was acquitted of rape and was convicted of assault with intent to rape and of atrocious assault and battery.

On appeal to the Appellate Division, the conviction of atrocious assault and battery was vacated.

At the February 20 and 23, 1981 hearing on the State Petition for Writ of Habeas Corpus, Petitioner was sworn and testified to the following:

(a) He was not asked by the Court or his trial attorney to attend any of the in chambers conferences that took place during the course of his trial.

(b) Had he been advised that he could attend these conferences, particularly the one at which testimony of the prosecutrix was taken, he would have attended.

(c) He never advised the Court or his trial counsel that he did not want to attend the conferences.

(d) Having subsequently read the transcripts of the conferences, Appellant stated that most of what was elicited in chambers was previously unknown to him.

(e) Specifically, Appellant had not previously known that the prosecutrix had been smoking marijuana on the morning of the alleged rape.

(f) After the conferences had taken place, trial counsel advised Appellant only very generally as to what had transpired.

At the conclusion of the habeas corpus hearing, the Court discussed the practice of conducting *in camera*

hearings outside the presence of the defendant:

> Now, at the outset I would have to concede that the better practice would have been to have the defendant present during the *in camera* proceeding.
>
> * * *
>
> . . . as I say, with the visual acuity one gains from hindsight, I am compelled to concede that the better process would have been either to clear the courtroom or to bring the defendant into chambers.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals is in conflict with applicable decisions of this Court.

II. This case raises an important federal question which has not been, but should be, settled by this Court.

A. APPELLANT'S RIGHT TO BE PRESENT AT EVERY STAGE OF HIS TRIAL.

1. Constitutional Implications.

Petitioner argued below that it was prejudicial error to exclude him from the *in camera* hearing that took place during the course of his trial.[2]

The right of an accused to be present at his trial is a basic and well-established principle which is premised on several constitutional sources. This Court has held that the due process clause of the Fifth Amendment requires the defendant's attendance at trial. *Hopt v. People of the Territory of Utah*, 110 U.S. 574, 579 (1884). That right

[2] Indeed, as set out in Appellant's statement of facts the trial court conducted six such in chambers conferences during the course of the trial. Appellant was not present at any of these conferences. Although these subsequent conferences primarily concerned questions of law, this pattern of exclusion should not be condoned.

was declared applicable to the states "to the extent that a fair and just hearing would be thwarted by [the defendant's] absence." *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934). The Due Process Clause of the Fourteenth Amendment requires that every defendant in a criminal case be given a fair trial. *Estelle v. Williams*, 425 U.S. 501 (1976). The orderly conduct of a trial by jury which is essential to the proper protection of the right to be heard entitles a defendant to receive notice of and be present at all proceedings after a jury is impanelled until the verdict is rendered. *Fillippon v. Albion Vein State Co.*, 250 U.S. 76 (1919).

Moreover, this Court has held that the Sixth Amendment guarantees the right of an accused to be present not only whenever testimony is taken, but "in the courtroom at every stage of his trial". *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

The Sixth Amendment right of confrontation is fundamental to a fair trial and was incorporated into the Fourteenth Amendment and made applicable to the states. *Pointer v. Texas*, 380 U.S. 400 (1965); *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975); *Illinois v. Allen*, *supra; Davis v. Alaska*, 415 U.S. 308 (1974).

In the instant case, Petitioner was deprived of his Sixth Amendment right of confrontation when he was excluded from an *in camera* conference during which the state's key witness was *voir dired* concerning testimony potentially exculpatory to Petitioner. Matters were presented to the Court concerning critical questions of fact; had Petitioner been present he could have provided aid to his trial counsel. Petitioner's inability to be present at these hearings affected his substantial rights and constituted prejudicial error. Petitioner was, therefore, denied

a fair and just trial and was denied his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Statutory Implications.

The right of a criminal defendant to be present at every stage of his trial is a common law right preserved by Rule 3:16, New Jersey Rules Governing Criminal Practice, which provides *inter alia:*

> The defendant shall be present at every stage of the trial . . .

The test of whether or not a defendant has been deprived of this right was stated by the New Jersey Court of Appeals in *Ex parte Hodge*, 24 N.J. Super. 564, 95 A.2d 156 (1953):

> The test, broadly stated, is whether anything occurs in his absence that was new, supplementary and additionally inculpatory or tending to degenerate his defense and in conflict with his right to be confronted by the witnesses, to be represented by counsel, and to maintain his defense upon the merits. (citations omitted). At 95 A.2d 157.

Clearly, the instant facts constitute a situation where Appellant was deprived of an opportunity "to be confronted by the witnesses" against him and to "maintain his defense upon the merits".

B. PREJUDICIAL ERROR OCCURRED

In the proceedings below, Petitioner argued that the unique facts of this case raise an important question of first impression. In *State v. Auld*, 2 N.J. 426, 67 A.2d 175 (1949), the Supreme Court of New Jersey addressed the analogous issue of whether exclusion of a defendant from an *in camera* conference constituted prejudicial error. The

Auld Court held that although a private communication between the Judge and jury in the defendant's absence was improper, it did not amount to reversible error because the written communication repeated verbatim the jury charge as it was given in open court with the defendant present. The court stated that the sole test is whether the irregularities prejudiced the defendant in maintaining his defense on the merits and concluded that in *that instance* there was no prejudicial error since what occurred in the absence of the defendant, was later repeated in open court when the defendant was present. "It added nothing to nor emphasized anything contained in the charge. The defendant could have suffered no prejudice". *Auld, supra*, at 67 A.2d 178.

In the instant case, however, the Petitioner was clearly prejudiced by his inability to be present at the in chambers hearing where the prosecutrix testified to matters which were potentially exculpatory to the defendant. Petitioner's exclusion from these hearings deprived him of the opportunity to advise his counsel and to cross-examine his accusers. As the *Auld* Court stated:

> If the record showed affirmatively that the defendant had been prejudiced by the improper communication, there would be reversible error. *Likewise, if the record failed to show whether or not the communication was prejudicial it would be presumed to be so and be cause for a reversal.* (Emphasis added). 67 A.2d at 178.

It has been held in *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971), that the standard by which to determine whether reversible error occurred "is not whether the accused was actualy prejudiced, but *whether there is 'any reasonable possibility of prejudice'* ". (Emphasis added) (At 1050) In reversing Wade's conviction, based

on the fact that the defendant was absent from the courtroom when the jury returned for further instructions, the Court concluded that it was possible that the defendant's absence made no difference in the result reached, but that to hold his absence harmless would be too speculative:

> It would assume to reconstruct what might have eventuated had he been present, when that cannot truly be reconstructed with a degree of certainty essential to avoid the reasonable possibility of prejudice. At 1051.

This standard was also applied by the Tenth Circuit Court of Appeals in *Jones v. United States*, 299 F.2d 661 (1962) where the court determined that no conviction can stand where the defendant was not present at all stages of the proceedings, "*unless the record completely negatives any reasonable possibility of prejudice arising from such error.*" At 662. (Emphasis added)

In the instant case, it *cannot* reasonably be concluded that Petitioner "could have suffered no prejudice" as a result of his absence from the *in camera* hearings. *Auld*, as controlling precedent, is consistent with the majority view as stated in *Wade*, *supra* and *Jones*, *supra*, and should have been applied here. Certainly, Petitioner had demonstrated that his exclusion from the *in camera* hearing constituted a "reasonable *possibility* of prejudice" which *might* frustrate the fairness of the proceeding.

The trial of the instant case ultimately would turn on whether the jury believed Petitioner's testimony (that he never saw Ms. Langner on the morning of the alleged rape) or the testimony of the prosecutrix. Because of his lack of knowledge of the facts as they existed on the morning of the alleged rape, Petitioner was placed at a distinct disadvantage. Defense counsel in a criminal trial is often dependent upon information gleaned from the

defendant during the cross-examination of a critical witness. Ms. Langner's testimony during the lengthy February 1, 1979 *voir dire* may have been different had the accused been present to visually confront his accuser. Petitioner was obviously prejudiced by his inability to be present at the in chambers hearing during which the first critical information was elicited from Ms. Langner. The taking of that testimony, outside the presence of the Petitioner, violated his fundamental right to be present, to confront his accusers, and to aid trial counsel during critical stages of his trial.

CONCLUSION

Excluding Petitioner from the *in camera* conference conducted during his trial, constituted an undue abridgement of the constitutional right of confrontation and due process of law and the statutory right afforded by Rule 3:16, New Jersey Rules Governing Criminal Procedure. During the in chambers hearing, matters were presented to the Court concerning critical questions of fact. Petitioner's inability to be present at the hearing prejudiced him in maintaining his defense on the merits. Petitioner was, therefore, denied a fair and just trial.

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

KADISH AND KADISH, P.C.

By: _____
MARK J. KADISH

By: _____
ROSALYN S. KADISH

CERTIFICATE OF SERVICE

This is to certify that I have this date served the following persons with copies of the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit: Solicitor General of the United States, Room 5614, Department of Justice, Washington, D.C. 30530, and Ms. Mary L. Cupo, Deputy Attorney General, 25 Market Street, CN 086, Trenton, New Jersey 08625, by depositing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to insure delivery.

This the ____ day of July, 1983.

MARK J. KADISH

APPENDIX A

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2700-78

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

FRANCIS CARNICLE,
Defendant-Appellant.

Argued October 15, 1980 – Decided October 31, 1980

Before Judges Michels, Ard and Furman.

On appeal from the Superior Court, Law Division, Morris County.

Donald M. Weitzman argued the cause for appellant (Glucksman & Weitzman, attorneys).

Rocky L. Peterson, Deputy Attorney General, argued the cause for respondent (John J. Degnan, Attorney General, attorney).

PER CURIAM

Defendant appeals from his conviction of assault with intent to rape and of atrocious assault and battery entered on a jury verdict. He was acquitted of rape. The victim was the 16 year old sister of his wife who resided with him, his wife and several children. He also appeals from his sentence to a State Prison term of three to five years

and a $3000 fine for assault with intent to rape and to a concurrent State Prison term of two to three years for atrocious assault and battery.

App. 60

Defendant raises these points on appeal:

POINT I – THE TRIAL COURT COMMITTED VARIOUS ERRORS ON EVIDENTIAL RULINGS DURING THE COURSE OF THE TRIAL WHICH BOTH INDIVIDUALLY AND CUMULATIVELY PREJUDICED THE DEFENDANT TO THE EXTENT THAT A NEW TRIAL IS REQUIRED.

A – THE TRIAL COURT IMPROPERLY REFUSED TO ADMIT EXHIBITS D5, D6 and D7 INTO EVIDENCE.

B – THE REFUSAL TO ALLOW DR. KIM, AN EXPERT WITNESS, TO GIVE EXPERT TESTIMONY REGARDING THE LOSS OF BODY HAIR CONSTITUTED REVERSIBLE ERROR.

C – THE STRIKING OF TESTIMONY REGARDING THE VICTIM'S DIARY ENTRIES CONSTITUTED REVERSIBLE ERROR.

D – THE FAILURE TO ALLOW TESTIMONY ABOUT THE VICTIM'S USE OF MARIJUANA AT THE TIME OF THE OFFENSE CONSTITUTES REVERSIBLE ERROR.

E – THE REFUSAL TO ALLOW QUESTIONING OF DEBBIE POST REGARDING THE NATURE OF THE FRESH COMPLAINT MADE BY THE VICTIM CONSTITUTED REVERSIBLE ERROR.

F – ADMISSION OF REBUTTAL TESTIMONY OF ISABEL RAYMOND REGARDING AN OVERHEARD TELEPHONE CONVERSATION CONSTITUTED REVERSIBLE ERROR.

POINT II – THE CONVICTION FOR ATROCIOUS ASSAULT AND BATTERY SHOUD BE VACATED AS BEING AGAINST THE WEIGHT OF THE EVIDENCE OR, IN THE ALTERNATIVE, MERGED INTO THE CONVICTION FOR ASSAULT WITH INTENT TO RAPE.

A – THE ATROCIOUS ASSAULT AND BATTERY CONVICTION SHOULD BE VACATED.

B – IN THE ALTERNATIVE, THE CHARGE OF ATROCIOUS ASSAULT AND BATTERY MERGES INTO THE CHARGE OF ASSAULT WITH INTENT TO RAPE AND MUST BE VACATED.

POINT III – THE CONVICTION FOR ASSAULT WITH INTENT TO RAPE SHOULD BE REVERSED.

A – THE CONVICTION WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE.

App. 61

POINT IV – FAILURE TO INSTRUCT THE JURY ON EXPERT TESTIMONY CONSTITUTED REVERSIBLE ERROR.

POINT V – THE SENTENCE OF THE COURT WAS MANIFESTLY EXCESSIVE AND THE CASE SHOULD BE REMAND-

ED FOR RESENTENCING, OR THIS COURT SHOULD EXERCISE ITS JURISDICTION AND VACATE THAT PART OF THE SENTENCE PROVIDING FOR INCARCERATION.

On appeal the State concedes that the conviction of the lesser included crime, atrocious assault and battery, should merge into the conviction of assault with intent to rape. We agree. *State v. Parker*, 153 *N.J. Super.* 535, 539 (App. Div. 1977); *State v. Francis*, 128 *N.J. Super.* 346, 352 (App. Div. 1974).

Our review of the entire record convinces us that Points I, III, IV and V raised by defendant are clearly without merit. *R.* 2:11-3(e)(2). The sentence for assault with intent to rape was not manifestly excessive nor unduly punitive. *State v. Whitaker*, 79 *N.J.* 503, 512-514 (1979). We conclude that no prejudicial error was committed in the various evidential rulings challenged on appeal, pointing out in particular that, although photographs of defendant's son showing scratches by the family dog were not allowed in evidence, testimony was before the jury that the dog had scratched and bitten both that son and a daughter; the victim's diary entries were excluded from evidence because of references to prior sexual molestations which would have been prejudicial to defendant; and the victim was cross-examined at length concerning her dislike of and bias against defendant, which her diary entries purportedly would have corroborated.

We vacate the conviction of atrocious assault and bat-

tery and affirm the conviction and sentence for assault with intent to rape. We remand for the entry of an amendatory judgment consistent with the views expressed in this opinion. We do not retain jurisdiction.

A TRUE COPY

Elizabeth McLaughlin

APPENDIX B

ORDER DENYING WRIT OF HABEAS CORPUS

February 23, 1981

KADISH, DAVIS & BROFMAN, P.C.
Suite 701
66 Luckie Street, N.W.
Atlanta, Ga. 30303
(404) 688-2000

CHARLES M. EGAN, JR., L.S.C.
ORIGINAL TO TRENTON

GLUCKSMAN & WEITZMAN
60 Maple Avenue
Morristown, N.J. 07960
(201) 267-2900

Attorneys for Applicant

FRANCIS CARNICLE, *Petitioner,* vs. JOHN FOX, Sheriff of Morris County, *Respondent*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS COUNTY

THIS MATTER Having been opened to the court, Honorable Charles M. Egan, Jr., presiding, on February 20, 1981 by Donald M. Weitzman and Mark J. Kadish, Attorneys for Petitioner, for issuance of Writ of Habeas Corpus, and the court having considered the Petition, Memoranda of Law, testimony of petitioner, and arguments of counsel, it is on this 23rd day of February, 1981

ORDERED that petitioner's application for Writ of Habeas Corpus is denied for the reasons set forth in the oral opinion of the court delivered on February 23, 1981.

HONORABLE CHARLES M. EGAN, JR., J.S.C.

APPENDIX C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

(Original Filed March 24, 1982 by Elizabeth McLaughlin, Clerk)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2433-80T4

FRANCIS CARNICLE,
Petitioner-Appellant,

v.

JOHN FOX, Sheriff of
Morris County,
Respondent-Respondent.

Argued March 8, 1982 – Decided March 24, 1982

Before Judges Milmed, Joelson and Gaulkin

On appeal from the Superior Court, Law Division, Morris County.

Mark J. Kadish of the Georgia bar argued the cause *pro hac vice* for appellant (Glucksman & Weitzman, attorneys; Donald Weitzman, of counsel).

Mary L. Cupo, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General, attorney; James R. Zazzali, former Attorney General and Ms. Cupo, on the brief).

PER CURIAM:

Petitioner appeals from a final order which denied his "application for Writ of Habeas Corpus". We affirm.

Petitioner had been convicted of assault with intent to

rape (*N.J.S.A.* 2A:90-2) and atrocious assault and battery (*N.J.S.A.* 2A:90-1). On appeal to this court the atrocious assault and battery conviction was vacated and merged into the conviction for assault with intent to rape; the conviction and sentence for assault with intent to rape were affirmed. *State v. Francis Carnicle*, Docket A-2700-78, decided October 31, 1980. The present action was initiated on February 20, 1981 by the filing of a pleading entitled "Petition for Writ of Habeas Corpus". The pleading projected a single issue, set forth in petitioner's brief on this appeal as follows:

> The exclusion of petitioner from certain *in camera* conferences during the course of his trial deprived him of his right to be present at all phases of his trial, his right to defend the charge against him, and his right to confront the witnesses against him, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the similar provisions of the Constitution of the State of New Jersey.

The filing of this purported habeas corpus proceeding was clearly in contravention of *R.* 3:22-3, which directs that a post-conviction relief application is "the exclusive means of challenging a judgment rendered upon conviction of a crime". A petition for post-conviction relief is specifically recognized by *R.* 3:22-2(d) as the procedure "for collateral attack upon a conviction" upon any ground previously available as a basis for collateral attack "by habeas corpus or any other common-law or statutory remedy." See *State v. Loray*, 46 *N.J.* 417, 419 (1966).

We choose to pass this irregularity and treat the habeas corpus petition as the functional equivalent of an *R.* 3:22 application. But, since the issue presented was not raised

on the prior appeal, *R.* 3:22-4 bars its assertion except upon a showing

> (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

The record here does not warrant a finding of fundamental injustice or constitutional deprivation resulting from defendant's absence from the *in camera* conferences. Although a defendant is entitled to be present when the jury is receiving evidence (*In re Forcella*, 40 *N.J.* 309, 315 (1963) (concurring opinion)), he "has no absolute right to be present on each occasion when questions of law are argued and any right which he may have may be waived by him or his counsel." *State v. Auld*, 2 *N.J.* 426, 433 (1949). And even if proceedings are improperly conducted in his absence, "the sole test [for setting aside the judgment] is whether such irregularities prejudice the defendant in maintaining his defense on the merits." *Id.*, at 434-435.

Here neither defendant nor his attorney objected to his non-presence at the conferences (*cf. United States v. Provenzano*, 620 *F.2d* 985, 998 (3d Cir., 1980), *cert.* den. 449 *U.S.* 899 (1980)); all but one of the six challenged conferences involved solely legal discussions between court and counsel; and the *in camera* proceeding at which the alleged victim's testimony was taken on the record yielded only information which we have already found, in the direct appeal, to have been properly excluded from evidence. We thus conclude, as did the trial judge, that nothing occurred in defendant's absence "in conflict with his right to be confronted by the witnesses, to be represented by counsel, and to maintain his defense upon the

merits." *State v. Nardella*, 108 *N.J.L.* 148, 153 (E. & A. 1931).

The February 23, 1981 order appealed from is affirmed. The order staying sentence issued by the trial court is vacated.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 82-1828

FRANCIS CARNICLE,
Petitioner,
v.
JOHN FOX, Sheriff of Morris County, and the ATTORNEY GENERAL of the State of New Jersey,
Respondent.

OPINION
TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey
June 30, 1982

BEFORE:
THE HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

MARK J. KADISH, Esq. (GA)
Attorney for the Petitioner

IRWIN I. KIMMELMAN
Attorney General
By: MARY CUPO
Deputy Attorney General
Attorney for the Respondent

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

/s/ THOMAS F. BRAZAITIS
THOMAS F. BRAZAITIS, C.S.R.,
Official Court Reporter

THE COURT: I see no reason to delay decision in this matter. I think all the papers necessary to the meritorious determination of this case are before the court.

I have read the papers as they have drifted in. Counsel is from Georgia, it's expensive for him and his client to travel to and from Newark for further appearances. Since all the material is at hand, I believe the case should be disposed of promptly.

May 9, 1978, Mr. Francis Carnicle, who apparently now is a resident of the state of Tennessee, was indicted by the Morris County Grand Jury in three counts. In Count 1 he was indicted for the crime of rape upon the person of Debbie Langner, Count 2 with assault with intent to commit rape, and Count 3, atrocious assault and battery.

He was convicted of assault with intent to rape, atrocious assault and battery and acquitted on Count 1.

On appeal to the Appellate Division on his conviction on Count 2, assault with intent to rape, was affirmed. The court held that the Count 3 conviction, AA&B, or atrocious assault and battery, merged with the Count 2 conviction of assault with intent to commit rape and vacated that conviction.

The sentence of confinement to the New Jersey State Prison for a term of, I believe, three to five years was, affirmed.

I do not have any information before me that a petition for certification was filed to the New Jersey Supreme Court after the first Appellate Division review. I presume one was.

MR. KADISH: Was not.

THE COURT: Thank you.

The petitioner here, defendant in the state court, Mr. Carnicle, then went before the Superior Court on a post-conviction proceeding, claiming that his constitutional rights were violated in that he was excluded from six in-chambers, or in-camera, proceedings during the course of his trial.

I think we can agree that of the six events that were complained of initially before Judge Egan in the Superior Court in Morristown, only one is of significance on this application today. And the others were clearly questions of law, such as objections to the charge, objections to points made in summation and on some of them the defendant was successful before Judge Egan in-camera.

At the start of the trial and before selection of the jury, the prosecutrix was examined in camera, in the chambers of Judge Egan with defense counsel and counsel for the state present but with the defendant not present concerning her past sexual history and sexual conduct.

After hearing the examination of the prosecutrix, Judge Egan ruled that her past sex history, or past sexual conduct, or sexual activities would be excluded and no error is complained of at this stage in the exclusion of that evidence.

The defendant, in his postconviction proceeding, was unsuccessful, the Appellate Division affirmed the denial of postconviction relief and almost immediately thereafter the present petition for habeas corpus was filed.

It seems quite clear to me that Judge Egan was eminently correct in ruling that on the evidence before him on the offer of proof made by examination of the complaining witness under oath, the history of the young lady's past sexual conduct was not admissible. Certainly

wouldn't have been admitted under Rule 412 of the Federal Rules of Evidence and, obviously, there can be no constitutional violation in refusing to admit that evidence and, as I understand it, no constitutional violation refusing to admit that evidence is contended here.

The issue is whether the failure to have the defendant present at the offer of proof on the voir dire of the prosecutrix violated his rights of the confrontation clause of the Sixth Amendment.

I can look for guidance to Rule 43 of the Federal Rules of Criminal Procedure.

Rule 43(a) says: "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

Rule 43(c) says: "A defendant need not be present in the following situations: (3) at a conference or argument upon a question of law."

I've been cited no case really closely in point. And the research from my law clerks has not found one. I can refer to somewhat analogous cases. One is *United States against Jorgensen*, 451 F.2d 516 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1971). And this was an in-camera inquiry about a wife of one of the witnesses who had been taking notes of testimony during the course of the trial. No error, no right of a defendant to be present.

United States against Easley, 505 F.2d 184 (9th Cir. 1974). That was a conference in which the defendant was not present concerning the scope of possible cross-examination of him, i.e., the defendant.

The court said: "These are the types of conferences

wherein an accused need not be present, and, as a matter of fact, it is often desirable that he not be so."

United States against Gunter, 631 F.2d 583 (8th Cir. 1980). There was an in-camera in-chambers evidentiary hearing about additional evidence, that which the prosecutor sought to produce.

The court held this was a waiver because the defendant had no objection to being absent from the proceeding.

The court also stated: "We would not characterize the in-chambers proceeding at issue as a stage of the trial but as a conference upon a question of law, at which the defendant need not be present."

Those are the closest cases that I have dealing with the type of problem we have here that I have been cited or which we have found.

My opinion is that there was no constitutional violation in the exclusion of Mr. Carnicle from the voir dire proceeding during which the prosecutrix was examined under oath with respect to an offer of proof about her past sexual conduct. I don't think it makes any difference, if he had a right to be present, when this voir dire took place—before the jury impaneling began or whether it took place after testimony had begun to be adduced. I don't think that is of any significance at all.

However, a ruling on an offer of proof presents to a court a question of law. Offers of proof are made in a variety of ways.

An attorney may stand up and make a verbal offer of proof following which there would probably be argument and ruling of the court.

I have required, and I'm sure many other judges have, offers of proof to be made in writing so I can study them,

hear argument on them and rule on the admissibility of the offer.

I think it quite clear that this presents solely questions of law during which a defendant need not be present. That is, the defendant would not have a confrontation right to be present when the offer of proof was recited, or there's argument on the offer, whether it is a recitation of an attorney or filed in writing.

In this case the offer of proof was made, as are many, by examining the witness under oath to determine exactly what the witness is going to say. And making a very clear, iron-clad offer of proof.

I still think that the method of adduction of the offer does not affect the issue of whether the confrontation clause is involved.

The fact that it may be more efficient or more expeditious to take the offer from the lips of the witness under oath does not, in my mind, translate this from a question of law into being a question of fact.

I have to point out the sole purpose of the in-camera hearing was to elicit evidence pertaining to the young lady's past sexual activities and determine its admissibility. So I do not believe that there was a constitutional violation.

I think that even though live testimony was taken, it still was adjunct to and part of the presentation of the question of law to the court where I think it quite clear defendant has no confrontation clause rights to be present.

If I am in error in this, then it is also my judgment that there has been a demonstration very clearly that any error in excluding Mr. Carnicle from this offer of proof in chambers was harmless beyond a reasonable doubt.

First, it is not contended that the exclusion of the past sexual conduct of the prosecutrix was an erroneous legal ruling. The Appellate Division has affirmed that ruling on the initial appeal on the merits. And that matter would not, in any event I do not believe, would rise to one of constitutional dimensions.

Second, the evidence was to me, if admissible at all, only relevant to the Count for rape. It would not be relevant, in my judgment, whatsoever, to the second count, assault with intent to commit rape, the sole count on which Mr. Carnicle was convicted.

I think that even if Judge Egan had erroneously excluded the evidence of past sexual conduct of the prosecutrix, the acquittal on the rape count would have made that erroneous evidentiary exclusion clearly harmless, beyond not only reasonable doubt but I think beyond all doubt.

I do not believe there's been any prejudicial error whatsoever to Mr. Carnicle's rights. Even if he had a confrontation clause right to be present at the adduction of this offer of proof.

I would also point out that as an aside, really, that giving relief in this case would, as far as I'm concerned, almost certainly lead to a retrial of Mr. Carnicle on the second count of the indictment, assault with intent to commit rape.

It is very clear to me that at that trial, since it was an assault only, not a rape charge, evidence of the past sexual conduct or misconduct, if you want to put it that way, of the prosecutrix, would be totally irrelevant.

The fact that a woman may be promiscuous may go to the issue of consent rather than forcible rape, but it cer-

tainly gives no one any license to assault her.

So for the reasons I have outlined I will deny the petition for the writ of habeas corpus.

* * *

UNITED STATES DISTRICT COURT

Civil Action No. 82-1828

(Original filed June 30, 1982 by Allyn Z. Lite, Clerk)

UNITED STATES ex rel. FRANCIS CARNICLE, *Petitioner,* —vs— JOHN FOX, Sheriff of Morris County, and IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, *Respondents.*	BRIEF ORDER

For the reasons set forth in the Court's oral opinion delivered from the bench on June 30, 1982, it is on this 30 day of June, 1982 ORDERED THAT:

Petition for writ of Habeas Corpus in the above-captioned matter is dismissed.

IT IS FURTHER CERTIFIED that there is probable cause for appeal.

/s/ MEANOR

H. CURTIS MEANOR
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5389

CARNICLE, FRANCIS,
Appellant

v.

JOHN FOX, Sheiff of Morris County and
THE ATTORNEY GENERAL of the
State of New Jersey

Appeal from the United States District Court for the District of New Jersey-Newark
(D.C. Civil Action No. 82-1828)
District Judge: Honorable H. Curtis Meanor

Argued April 26, 1983

Before HUNTER and HIGGINBOTHAM, *Circuit Judges* and STAPLETON,* *District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, Francis Carnicle, namely that appellant's absence from six *in camera* hearings, specifically the February 1, 1979 pretrial conference, violated his constitutional right to be present at all phases of his criminal trial and violated his constitutional right to confront the witnesses against him, in contravention of the Fifth, Sixth, and

*Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation

Fourteenth Amendments of the United States Constitution, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ JAMES HUNTER, III

JAMES HUNTER, III, *Circuit Judge*

Attest:

/s/ SALLY MRVOS

SALLY MRVOS, *Clerk*

Dated: May 12, 1983